

SENATE RECORD VOTE ANALYSIS

104th Congress
1st Session

Vote No. 599

December 12, 1995, 3:08 p.m.
Page S-18373 Temp. Record

FLAG PROTECTION CONSTITUTIONAL AMENDMENT/Substitute (McConnell)

SUBJECT: Flag Protection Constitutional Amendment . . . S.J. Res. 31. McConnell substitute amendment No. 3097.
ACTION: AMENDMENT REJECTED, 28-71

SYNOPSIS: As reported, S.J. Res. 31, the Flag Protection Constitutional Amendment, will propose the following article as an amendment to the Constitution of the United States, to be valid if ratified by the legislatures of three-fourths of the States within 7 years from the date of its submission by Congress: "The Congress and the States shall have power to prohibit the physical desecration of the flag of the United States." (Prior to conducting any rollcall votes on the resolution, the Senate agreed by voice vote to an amendment to remove the clause "and the States" from the proposed article.)

The McConnell substitute amendment would enact a statute instead of a constitutional amendment. Under the amendment, any person who destroyed or damaged a flag of the United States with the primary purpose and intent of inciting or producing imminent violence or a breach of the peace, in circumstances in which the person knew it was reasonably likely to produce imminent violence or a breach of the peace, could be fined up to \$100,000 and imprisoned for up to 1 year. Additionally, any person who stole or knowingly converted to his or her use, or the use of another, a flag of the United States belonging to the United States, and intentionally destroyed or damaged that flag would be fined not more than \$250,000 and imprisoned for not more than 2 years. Finally, any person who intentionally destroyed or damaged a flag on Federal property that belonged to another person would be fined not more than \$250,000 and imprisoned for not more than 2 years.

Those favoring the amendment contended:

We will not support the underlying resolution because we will not vote to restrict free speech, especially when that restriction is closely tied to the most important speech in a republic, political speech. The strength of America is not in its weapons or in its money, but in its commitment to democracy and in its defense of individual liberties. We will vote in favor of the McConnell amendment, however, because it would provide swift and certain punishment for those who burned the flag to incite violence while at the same time it would clearly not infringe upon first amendment freedoms.

(See other side)

YEAS (28)		NAYS (71)		NOT VOTING (0)	
Republicans (5 or 9%)	Democrats (23 or 50%)	Republicans (48 or 91%)	Democrats (23 or 50%)	Republicans (0)	Democrats (0)
Bennett	Akaka	Abraham	Helms	Baucus	
Chafee	Bingaman	Ashcroft	Hutchison	Biden	
Jeffords	Boxer	Bond	Inhofe	Breaux	
McConnell	Bradley	Brown	Kassebaum	Bryan	
Specter	Bumpers	Burns	Kempthorne	Byrd	
	Conrad	Campbell	Kyl	Exon	
	Daschle	Coats	Lott	Feingold	
	Dodd	Cochran	Lugar	Feinstein	
	Dorgan	Cohen	Mack	Ford	
	Harkin	Coverdell	McCain	Glenn	
	Kerry	Craig	Murkowski	Graham	
	Kohl	D'Amato	Nickles	Heflin	
	Lautenberg	DeWine	Pressler	Hollings	
	Leahy	Dole	Roth	Inouye	
	Levin	Domenici	Santorum	Johnston	
	Lieberman	Faircloth	Shelby	Kennedy	
	Mikulski	Frist	Simpson	Kerrey	
	Murray	Gorton	Smith	Moseley-Braun	
	Nunn	Gramm	Snowe	Moynihan	
	Pell	Grams	Stevens	Reid	
	Pryor	Grassley	Thomas	Robb	
	Sarbanes	Gregg	Thompson	Rockefeller	
	Simon	Hatch	Thurmond	Wellstone	
		Hatfield	Warner		

EXPLANATION OF ABSENCE:

- 1—Official Business
- 2—Necessarily Absent
- 3—Illness
- 4—Other

SYMBOLS:

- AY—Announced Yea
- AN—Announced Nay
- PY—Paired Yea
- PN—Paired Nay

Perhaps the most fundamental liberty is the first one enumerated in the Bill of Rights: the freedom of speech. That freedom means nothing unless people are allowed to express views that are offensive and repugnant to others--there is nothing granted in allowing people to express views with which everyone agrees. The reason we have a first amendment is that the Founding Fathers believed that, despite all the excesses and offenses that freedom of speech would undoubtedly allow, truth and reason would win out in the end. Paradoxically, and, as history has proven, accurately, the best antidote to offensive speech is not repression of that speech but more speech.

For years people in other countries saw it as a peculiar weakness of America that it tolerated so much vitriolic dissent. As the past several decades have brought dozens of new democracies from the ashes of failed dictatorial regimes that vigorously suppressed free speech, there has been a growing awareness that this tolerance is a great strength. We think in particular of the testimony of Jim Warner, a prisoner of war in North Vietnam from 1967 to 1973. During his imprisonment, he was tortured, denied adequate food, and locked in solitary confinement for 1 year. During his internment, a Vietnamese interrogator taunted him with a picture of Americans protesting the war by burning the flag, saying: "There. People in your country protest against your cause. That proves you are wrong." Jim Warner replied: "No--that proves I am right. In my country we are not afraid of freedom--even if it means that people disagree with us." As he further tells the story, the North Vietnamese interrogator reeled back, "His face purple with rage ***. I was astonished to see pain, confounded by fear, in his eyes." Drawing on this experience, Jim Warner wrote the following about the issue before us today: "We don't need to amend the Constitution in order to punish those who burn our flag. They burn the flag because they hate America and they are afraid of freedom. What better way to hurt them than with the subversive idea of freedom?"

When hateful people burn the flag they send the political message that America is a lousy country, that its faults are beyond repair, and that it deserves to be torn down and reviled. They also dishonor the millions of brave men and women who have fought under the flag, saying that they were involved in unworthy causes. Burning the flag is a uniquely offensive way of disparaging their heroism and trivializing their sacrifice. Many of us have fought for our country; some of us have been wounded; we all know people who have died fighting under the flag of freedom. Those twisted people who burn the flag know the pain they inflict by sending this message of hate.

This message is an inherently political message. As such it demands first amendment protection. However, when it also is done with the intent of provoking patriotic Americans into acts of lawlessness it is not protected. From *Chaplinsky v. New Hampshire's* "fighting words" doctrine in 1942 to *Brandenburg v. Ohio's* incitement test in 1969 to *Wisconsin v. Mitchell's* "physical assault" standard in 1993, the Supreme Court has never protected speech which causes or intends to cause physical harm to others.

On this basis we have proposed the McConnell statutory amendment. This amendment would make it illegal to destroy or damage a flag of the United States with the primary purpose and intent of inciting or provoking imminent violent or a breach of the peace. The fine would be severe--up to a \$100,000 fine and up to a 1-year sentence could be imposed. The amendment would also make it illegal to damage a flag stolen from the United States Government or stolen and then damaged on Federal lands. We have consulted with several constitutional experts and have been told that this amendment should withstand constitutional scrutiny. Americans should have an unfettered right to free speech in America, however repugnant that speech may be. That right does not include, however, the right to incite violence. The McConnell amendment would protect the flag by punishing those who would desecrate it in an attempt to inflame passions and provoke violence. At the same time, it would not impinge on first amendment freedoms, and it would not amend the Constitution. This amendment gives Senators a meritorious alternative to the unsupportable underlying resolution. We urge them to give it their support.

Those opposing the amendment contended:

Senators should defeat the McConnell amendment for two reasons. First, it would provide scant protection for the flag. Most of the recent flag burnings would not have been held illegal under its narrow strictures. Second, as soon as the amendment was brought before the Supreme Court, the scant protections it would provide would be struck down as unconstitutional. It is wishful thinking indeed to think that the Supreme Court will be fooled by the artifice of claiming that the intent of the amendment has nothing to do with the content of the expression being banned.

On the first reason, we begin by pointing out that the McConnell amendment would not apply to the very case (*Texas v. Johnson*) in which the Supreme Court struck down all flag protection statutes. In that instance, Gregory Johnson burned a flag that had been stolen from a bank. He did not burn the flag on Federal property; he burned it in front of city hall as a political protest. Thus, the second and third restrictions of the McConnell amendment (a ban on destroying flags stolen from the United States, and a ban on destroying stolen flags on Federal property) would not have applied. As for the first restriction (a ban on burning a flag when such action could cause imminent violence or a breach of the peace), we note that in the *Texas v. Johnson* case the majority found that unless there was evidence that a riot ensued or threatened to ensue one could not protect the flag under the breach of the peace doctrine. In other words, the court applied a high standard to the breach of the peace doctrine, and found that it did not apply in the case.

On the second reason, we find it very difficult to believe that the amendment could pass constitutional muster once it reached the Supreme Court (as it surely would). After the *Texas v. Johnson* case, Congress quickly enacted a facially content-neutral,

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flag-protection statute that it hoped would pass constitutional muster. On June 11, 1990, in *United States v. Eichman* (495 U.S. 928 (1990)), the Supreme Court struck that law down. The 5-4 majority found the following: "Although the Flag Protection Act contains no explicit content-based limitation on the scope of prohibited conduct, it is nevertheless clear that the government's asserted interest is 'related to the suppression of free expression,' and concerned with the content of such expression. The Government's interest in protecting the 'physical integrity' of a privately owned flag rests upon a perceived need to preserve the flag's status as a symbol of our Nation and certain national ideas". The Court did not believe that the Flag Protection Act was enacted to protect a piece of cloth--it knew that it was enacted to protect from desecration everything the flag represents. That fact was illustrated by the Act's allowance for the burning of soiled or worn flags. Obviously that allowance was to permit the respectful destruction of flags that were no longer suitable for display. Just as the court did not believe that the Flag Protection Act was intended to protect a piece of cloth, we do not expect that it would believe that the purpose of the McConnell amendment is to prevent breaches of the peace.

However, assuming that the Supreme Court accepted that the sole intent of the amendment was to prevent damaging a flag in order to cause a breach of the peace, it would still find the amendment unconstitutional under the rationale it used in *R.A. V. v. City of St. Paul* (112 S.Ct. 2538 (1992)). In that case, the Court ruled that even in regulating unprotected speech, it is not permissible to make content-based distinctions. In other words, laws against "fighting words" in general are constitutional, but laws that target only fighting words that express a particular point of view are not.

If the Supreme Court followed its own precedents, and we have no reason to believe it would not, it would find the McConnell amendment to be unconstitutional. Certainly there are constitutional experts who disagree, just as there are constitutional experts who disagree with all of the Court's rulings to date on the unconstitutionality of statutes to protect the American flag. This fact is not surprising; just like economists, if constitutional experts were all lined up they would all be pointing in different directions. Unlike economists, though, there are penultimate and ultimate experts who have the final say. The penultimate experts are Supreme Court Justices, who regularly issue decisions which have the effect of changing the understood meaning of the Constitution. The ultimate experts are the American people themselves, who have the power, the right, and the duty to elect representatives to amend the Constitution when they believe necessary.

This bipartisan resolution is not an initiative that originated in Washington. Following the defeat of an attempt in 1990 to pass a constitutional amendment to prohibit the burning of the flag, a grassroots coalition of veterans, patriotic, civics, and religious groups formed to press for the passage of a constitutional amendment. As this movement has grown, 49 State legislatures have responded by calling on Congress to pass such an amendment and submit it to them for ratification. Polls show that more than 80 percent of Americans support passage of this amendment. The House has passed this constitutional amendment. All now that stands in the way of the will of the people to restore the constitutional right to protection that the flag enjoyed for 200 years is the United States Senate. The McConnell amendment would thwart the will of the people by passing weak statutory protections instead that would be struck down by the Supreme Court. We strongly urge the rejection of this amendment.